NO. 82-5877

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHNNIE L. JOHNSON,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC &
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia properly determined that the imposition of the death penalty in Petitioner's case was not excessive or disproportionate under the facts of this case?

2.

Whether the Supreme Court of Georgia properly determined that the jury was not improperly precluded from the consideration of any mitigating factors during the sentencing phase of Petitioner's trial, either by the failure to admit available mitigating factors, or by the trial court's instructions to the jury?

3.

Whether the Supreme Court of Georgia properly performed its statutory duty and determined that the sentence of death imposed upon the Petitioner was not excessive or disproportionate to the penalty imposed in similar cases?

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PART ONE

STATEMENT OF FACTS

Petitioner, Johnnie L. Johnson, along with his codefendant Jerry Sprouse, was indicted in the Superior Court of Chatham County on July 21, 1974, for the murder, rape and kidnapping of Suzanne Edenfield and the kidnapping and aggravated assault of Mary Lynn Harrod.

Following a separate jury trial, Petitioner was found guilty on all charges and received a twenty year sentence for kidnapping, a ten year sentence for aggravated assault, a sentence of life imprisonment for rape and a sentence of death for murder. A motion for new trial was filed on August 6, 1975 and amended on March 13, 1978, but was denied on March 14, 1978.

Petitioner's convictions and sentences, including his sentence of death, were upheld on direct appeal to the Supreme Court of Georgia in Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978). Petitioner also filed an extraordinary motion for extraordinary relief which was denied in the Superior Court of Chatham County and upheld on appeal to the Supreme Court of Georgia in Johnson v. State, 246 Ga. 474, 271 S.E.2d 789 (1980).

Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, on July 20, 1981 and an amendment was filed on September 3, 1981. An evidentiary hearing was conducted on January 7, 1982 in the Superior Court of Butts County, at which time Petitioner was represented by counsel. On March 25, 1982, the Superior Court of Butts County, Georgia, denied Petitioner's petition for a writ of habeas corpus. A timely notice of appeal was filed and the Supreme Court of Georgia granted Petitioner's application for a certificate of probable cause to appeal on May 19, 1982.

Following the filing of briefs and the holding of oral argument in the Supreme Court of Georgia, that court affirmed the decision of the habeas corpus court denying the Petitioner the relief sought in Johnson v. Zant, 249 Ga. 812 ___ S.E.2d ___ (1982). This petition for a writ of certiorari seeks a review of that judgment of the Supreme Court of Georgia.

As a review of the facts presented at Petitioner's trial is necessary for this Court's determination of whether or not a petition for a writ of certiorari should be granted, a summary of the evidence admitted at Petitioner's trial is presented at this time for this purpose.

On July 20, 1974, Suzanne Edenfield and her sister, Becky, picked up Mary Lynn Harrod at her home, on their

way to a rock concert in Savannah, Georgia. After the concert, Suzanne dropped her sister off at home and she and Lynn drove in her Volkswagen toward Victory Drive in Savannah, Georgia, stopping along the way at a "7-11" convenience store.

As the girls pulled onto Victory Drive, a cream colored car, containing the Petitioner and his codefendant, Jerry Sprouse, pulled up on the passenger's side of the Volkswagen. Petitioner, who was driving the car told the girls that he and his friend were not from Savannah and asked where they could go to have a good time. (T. 45).[1] Lynn replied that she did not know where they could go and Petitioner then asked them if they wanted to stop and smoke a joint. (T. 46). When the girls agreed, Petitioner and Sprouse followed the girls and parked in front of Savannah High School. (T. 46). They all stopped and got out of the car, sat down in the park, and listened to tapes on Johnson's car tape player. They smoked two or three marijuana joints between them, for approximately fifteen minutes. (T. 48-49).

After about fifteen minutes, Suzanne and Lynn got up to leave and told the men they would see them later. They got in Suzanne's car and cranked it, when all of a sudden, Sprouse opened the car door on the driver's side. (T. 50-51). Sprouse had a gun that he had taken from the trunk of Petitioner's car and he ordered the girls to get into the Petitioner's car. (T. 51; 198-199). Sprouse sat in the backseat of the Petitioner's car, with Lynn in the middle and Suzanne on the driver's side, while Petitioner drove. Sprouse made Lynn put her head in Suzanne's lap. (T. 52). Lynn asked where they were going and one of the

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[1]References to the transcript of Petitioner's trial will be designated by "T", followed by the appropriate page number

men replied that the "big man", had seen them at the concert and wanted to talk to them. When Lynn asked who the "big man" was, they replied that she would find out when they got where they were going. (T. 54).

Petitioner gave Suzanne something to tie around Lynn's mouth, but when it wouldn't work, Petitioner stopped the car, got out and took something from the trunk and tied it around Suzanne's mouth. (T. 55). Suzanne was having trouble breathing through her mouth and Johnson told her that he would take off the gag, but "if she made any noise that he would kill her." (T. 55).

Petitioner and Sprouse tied the girls' hands up and told them to put their hands down as they started the car again and began driving until they reached a wooded area. (T. 56-57).

Petitioner stopped the car and got out, taking Suzanne and going up to the front of the car. (T. 57). Sprouse took off Lynn's halter top and pants and attempted to have intercourse with her. (T. 58-59). However, he did not succeed and got out of the car on the right side, when Petitioner and Suzanne returned to the car. (T. 60). Suzanne got back in the car with her hands still tied behind her back, and with her pants on, but without her top. She stated to Lynn that Johnson had raped her and that she thought that Johnson and Sprouse were serious, so do what they said. (T. 60).

Sprouse told the girls to get out of the backseat of the car and Johnson removed Suzanne's bluejeans. (T. 61). They told Suzanne and Lynn to stand off the side of the road. (T. 62). Petitioner and Sprouse stood in front of them, but Petitioner got in the car and turned it around. He then got out of the car and stood beside Sprouse. (T. 63). Lynn Harrod was uncertain as to which man had the gun at this time. Lynn did not hear anything

said between Petitioner and Sprouse and the next thing she heard was a gunshot. She turned around and saw Suzanne falling backwards to the ground. (T. 64). Then she heard the second shot which hit her and made her fall face down to the ground. (T. 65).

The next thing Lynn knew she was attempting to get up, with her hands still tied. (T. 65). She saw Suzanne lying on her back, with her hands still tied. Lynn got up and ran toward the house to get help. She knocked on the door and told the woman inside that she and her friend had been shot. The next door neighbors called the police. (T. 67-69).

At trial, Petitioner himself described the way in which he and Sprouse disposed of the gun and the girls' clothes. (T. 207). He stated that although he considered going to the police, he was scared and that when he and Sprouse returned to Beaufort, South Carolina, from Savannah, they then decided to run to Canada. (T. 208-210). Petitioner described how he and Sprouse had burned the car, prior to leaving for Canada (T. 209), and how they had returned to Suzanne's Volkswagen and wiped the fingerprints off of the car. (T. 236). Further facts will be discussed as is necessary for consideration by this Court in determining whether a petition for a writ of certiorari should be granted.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY APPLIED THIS COURT'S DECISION IN ENMUND V. FLORIDA, ___ U.S. ___, 102 S.Ct. 3368 (1982), IN DETERMINING THAT THE IMPOSITION OF A DEATH SENTENCE IN PETITIONER'S CASE WAS NOT EXCESSIVE, DISPROPORTIONATE OR ARBITRARY, SO AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OR THE APPROPRIATE PROVISIONS OF THE CONSTITUTION OF GEORGIA.

Petitioner contends that the Supreme Court of Georgia, in reviewing the denial of Petitioner's petition for a writ of habeas corpus, improperly applied the decision of this Court in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982), in finding that the imposition of the death penalty upon Petitioner was not excessive or disproportionate under the facts of this case.

It is interesting to note that on direct appeal to the Supreme Court of Georgia, immediately following Petitioner's convictions and sentences, the Supreme Court of Georgia concluded, "after reviewing the record, we conclude that the evidence presented at trial fully authorized the jury in finding that Johnson and Sprouse were equally involved in the commission of these crimes." Johnson v. State, 242 Ga. 649, 650, 250 S.E.2d 394 (1978).

In the sentence review portion of the Supreme Court of Georgia's opinion on direct appeal, the court found that

the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases. Id. at 656. However, in light of the decision of this Court in Enmund v. Florida, supra, the Supreme Court of Georgia reviewed the issue of disproportionality and excessiveness of the death penalty, in Petitioner's appeal from the denial of state habeas corpus relief.

Petitioner argues that in analyzing this issue under the principles set forth by this Court in Enmund v. Florida, supra, that the Supreme Court of Georgia did not focus on the factors appropriate for consideration of the issue of disproportionality, as outlined in this Court's decision. Petitioner contends that the focus of the determination should be whether Petitioner attempted to kill or intended to kill the victims. In its opinion, the Supreme Court of Georgia specifically focused on this particular language from Enmund v. Florida, supra, and noted that in discussing the facts of the case, this Court had noted that "'Enmund himself did not kill or attempt to kill . . . the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder.'" Johnson v. Zant, 249 Ga. 812, 816, ___ S.E.2d ___ (1982). Therefore, the Supreme Court of Georgia clearly focused on the appropriate factors for consideration of this issue, as outlined by this Court's decision in Enmund, supra.

However, the Supreme Court of Georgia noted that its interpretation of this Court's decision was not such a narrow one ". . . as to exclude imposition of the death penalty for all but those who fatally wield the murder weapon." Id. at 816. Respondent submits that this was a proper interpretation of this Court's decision and that the Supreme Court of Georgia focused on the appropriate factors in finding that the death penalty had not been

disproportionately imposed, nor was it excessive under the facts of the case.

With respect to the narrow nature of this Court's decision, Respondent respectfully submits that a reading of this Court's decision in Enmund v. Florida, readily indicates the limited nature of the Court's decision. First, Mr. Enmund received the death penalty on the basis of accomplice liability in a felony murder situation. Felony murder was not involved in this case. Additionally, this Court accepted the statistics presented by the Petitioner in Enmund and stated that these statistics showed that of 796 inmates under sentences of death for the offense of homicide, only 16 were not physically present when the fatal assault was committed and of these 16 prisoners, only 3, including Enmund, were sentenced to die without a finding that they hired or solicited someone else to kill the victim or to participate in a scheme designed to kill the victim. Enmund v. Florida, at 3375. Therefore, according to the statistics accepted by this Court, there are arguably only 3 persons on death row, nationwide, who might possibly be affected, at this time, by this Court's decision in Enmund v. Florida, supra. As is readily apparent from the previous review of the facts presented at Petitioner's trial, Petitioner was present at the time of the murder, with the only dispute being over the person who actually acted as the triggerman at the time of the murder.

Respondent asserts that the Supreme Court of Georgia correctly found that the facts in this case were "substantially dissimilar" from the facts presented to the court in Enmund. The evidence established that Petitioner drove the car at the time there was initial contact with the victim; that the gun utilized in the commission of the crimes was kept in the trunk of Petitioner's car; that

Petitioner got something out of the trunk to use as a gag for Suzanne Edenfield, told Ms. Edenfield that if she made any noise he would kill her; participated in tying the girls' hands up and ordering them to keep their heads down while Petitioner drove into a wooded area; raped Suzanne Edenfield; turned the car around; disposed of the gun and the girls' clothes; burned the car that was utilized during the crime and wiped fingerprints off of the car of the one of the victims. As already noted, the surviving victim, Lynn Harrod, was uncertain as to whether Petitioner or Sprouse had the gun at the time that she and Suzanne Edenfield were shot. (T. 63-64).

From this evidence, as well as other evidence to which the court pointed in its opinion, the Supreme Court of Georgia concluded that, "Johnson was not only present but active and participating throughout the commission of the crimes for which he is convicted, including the murder." Johnson v. Zant, 249 Ga. 812, 817, ___ S.E.2d ___ (1982). Therefore, Respondent contends that, contrary to the assertions of the Petitioner, that the Supreme Court of Georgia did properly focus on the facts enunciated by this Court in Enmund, for determining whether or not the imposition of the death penalty was excessive or disproportionate in this case. Respondent respectfully takes exception to the assertion of the Petitioner that the ultimate decision to murder the victims was solely the decision of codefendant Sprouse. Respondent also asserts that there is no support for this in the record of Petitioner's trial, but rather, that the active participation of the Petitioner in all of the events and his presence only a few feet from the victim prior to her murder, establishes Petitioner's direct participation in all of the crimes for which he was convicted.

Respondent also takes exception to the assertion of the Petitioner that the Supreme Court of Georgia did not give the culpability of the Petitioner individual consideration as required by this Court's decisions in Enmund, supra, and in Coker v. Georgia, 443 U.S. 584 (1977) and Lockett v. Ohio, 438 U.S. 586 (1978). Respondent respectfully submits that a fair reading of the decision of the Supreme Court of Georgia indicates that the court properly focused on the activities of the Petitioner, as opposed to that of his codefendant and differentiated between their participation in various aspects of the crime. Sprouse's actions were not imputed to Johnson, but rather, the evidence established that both of the men were active participants in the crime, although having varying roles at different points in time.

Petitioner asserts that he could not anticipate Sprouse's use of deadly force, but it has not even been established who utilized the final deadly force against the murder victim. Unlike Enmund, Petitioner was not only involved in similar activity prior to the crime and in the concealment phase of the crime, but was also involved throughout the entire criminal transaction and was physically present at the time of the murder of the victim, and participated to some degree in her death. Respondent submits that the Supreme Court of Georgia did make precise and consistent fact findings which were supported by the record and that Petitioner is attempting to minimize his role in the crimes, which was firmly established by the evidence presented by the prosecution.

For all of these reasons, Respondent respectfully submits that the Supreme Court of Georgia properly dealt with this issue and that there is nothing presented for the review of this Court.

II. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE SENTENCING JURY WAS NOT UNCONSTITUTIONALLY PREVENTED FROM CONSIDERING MITIGATING FACTORS.

Petitioner contends that his Eighth and Fourteenth Amendment rights under the Constitution of the United States were violated because the sentencer was precluded from properly focusing on Petitioner's own conduct. First, Petitioner argues, for the first time in this petition for a writ of certiorari, that the jury was instructed on several theories of liability, but no findings as to the liability of the Petitioner were required to be made by the jury or were in fact made by the jury. Petitioner admits that the jury at Petitioner's trial was instructed on several theories of liability, including aiding and abetting, malice murder and felony murder and Respondent contends that it was for the jury to determine Petitioner's guilt or innocence based on the instructions of the trial judge as a whole. Respondent contends that this issue, raised for the first time on appeal, should not be reviewed by this Court, Cardinale v. Louisiana, 394 U.S. 437 (1969).

However, an examination of this argument indicates that essentially what Petitioner argues is that if the evidence was insufficient to support a death penalty, then the sentence must fall, and this is what has previously been discussed in connection with the first contention raised by Petitioner in this petition for a writ of certiorari. Respondent's position is that the evidence was sufficient for the jury to determine that Petitioner was guilty of direct participation in the murder and other

crimes for which he was convicted and properly determined that the death sentence was appropriate.

Petitioner also claims, as he did in his state habeas corpus petition and on appeal from the Supreme Court of Georgia from the denial of state habeas corpus relief, that the sentencing jury was precluded from considering mitigating factors in particular circumstances of the offense. Petitioner cites this Court's decision in Enmund v. Florida, supra as singling out nine state murder statutes "likely to generate disproporationate death sentences under the analysis of Enmund." If the reference to this Court's decision in Enmund is examined, however, this Court simply recognized that Georgia is one of nine jurisdictions which ". . . authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life." Enmund v. Florida, at 3372. It has already been discussed that the facts of this particular case differentiate it from such a situation, as Petitioner was a direct participant in all of the crimes.

Next, Petitioner claims that the jury at Petitioner's trial did not have before them mitigating evidence to consider Petitioner's conduct and culpability and further that the trial court's charge on mitigating circumstances was improper, as it did not provide the jury with the proper guidance.

It should be noted that the Supreme Court of Georgia observed in connection with Petitioner's claim of ineffective assistance, that Petitioner's trial attorney made a tactical decision not to submit "character evidence", at the sentencing phase of Petitioner's trial, as he knew of no witnesses who would have been helpful. Further, he made a tactical decision not to place his client on the stand, because he had made a poor witness

during the guilt/innocence phase of his trial. Johnson v. Zant, 249 Ga. 812, 813, ___ S.E.2d ___ (1982). Therefore, the jury was not precluded from considering mitigating factors, but rather, counsel made a tactical decision not to place any evidence in mitigation at Petitioner's sentencing phase, in the belief that any available information would not be beneficial.

With respect to the trial court's instructions, the Supreme Court of Georgia concluded that, "the trial court charged properly as to consideration of mitigating circumstances and the option to recommend against death." Johnson v. Zant, 249 Ga. 812, 814, ___ S.E.2d ___ (1982). The trial court properly defined mitigating circumstances as those circumstances, ". . . which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." (T. 267). The jury was properly informed that under Georgia law, they were authorized to consider all of the evidence received in court, if any, in mitigation and aggravation. (T. 267).

To have singled out specific mitigating factors, might have misled the jury into thinking that only those factors enumerated could be considered as mitigating, rather than establishing the fact that any evidence presented to the jury in either phase of the trial, might properly be viewed as mitigating by the jury pursuant to their function as fact finders.

In Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), the court considered whether the trial court's charge on mitigating circumstances was constitutional. In this regard, the United States Court of Appeals for the Fifth Circuit stated that in order to meet the constitutional

requirements of the Eighth and Fourteenth Amendments, that certain basic elements must be present. The court stated:

> In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend death . . .

Id. at 471.

A review of the charge as a whole in this case shows that the jury was adequately charged as to the responsibility with reference to mitigating circumstances and their option to recommend a life sentence and the Supreme Court of Georgia so found in concluding that this contention was without merit. Respondent respectfully submits that this issue presents nothing for review by this Court.

III. THE SUPREME COURT OF GEORGIA PROPERLY FOUND THAT THE SENTENCE OF DEATH IMPOSED AGAINST THE PETITIONER WAS NOT UNCONSTITUTIONAL AS BEING EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES.

To some extent, Petitioner's third allegation is a restatement of the initial allegation made that the facts and circumstances of Petitioner's case require a finding that the death penalty is excessive and disproportionate, as it cannot be proven that he was the triggerman in the murder. As has already been noted, the Supreme Court of Georgia in reviewing Petitioner's sentence on direct appeal stated, "After reviewing the record, we conclude that the evidence presented at trial fully authorized the jury in finding that Johnson and Sprouse were equally involved in the commission of these crimes." Johnson v. State, 242 Ga. 649, 650, 250 S.E.2d 394 (1978).

Further, in conducting their mandatory sentence review, as required by Georgia law, the court concluded that the sentence of death in Petitioner's case was not imposed under the influence of passion, prejudice or any other arbitrary factor. Johnson v. State, supra, at 655. The court also determined that the evidence supported the aggravating circumstances and determined that the death penalty in this case was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Johnson v. State, supra, at 656. An appendix of the cases considered in connection with this contention was listed by the court.

On review of Petitioner's sentence in his appeal from the denial of state habeas corpus relief, the court reaffirmed its earlier holding by stating, "we do not find the sentence of death imposed here to be excessive or disproportionate to the penalty imposed in similar cases." Johnson v. Zant, 249 Ga. 812, 817, ___ S.E.2d ___ (1982).

The proportionality review mandated by Georgia law has been interpreted by the Supreme Court of Georgia to require comparison of the sentence given in a death penalty case, not only with other cases in which the death penalty has been imposed, but also with cases in which penalties of less than death were imposed. For example, in Moore v. State, 233 Ga. 861, 865-866, 213 S.E.2d 829 (1975), cert. denied, 428 U.S. 910, death sentence vacated sub nom, Moore v. Balkcom, 513 F.Supp. 772 (S.D. Ga. 1981), the court stated:

> [W]e view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly or freakishly imposed' as stated by Justice Stewart in his concurring opinion in the Furman and Jackson cases.

(408 U.S. 238, 310), supra.

The court also stated, ". . . this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics." Moore, supra, at 863-864. Finally, under Georgia law, even though a case is

appropriate for the death penalty, the jury may, as an act of mercy, without regard to sentence proportionality, impose a life sentence. Therefore, the efficacy of comparing non-death penalty cases for determining the proportionality of a case in which the death penalty is imposed, is severely limited.

The fact that Petitioner's codefendant, who received a separate trial, had his death penalty reversed because of the exclusion of certain evidence during the sentencing phase and has presently been returned to the trial court for a retrial as to sentence, does not require a finding that the Petitioner, a direct participant in all of the crimes, have his sentence of death vacated as excessive or disproportionate.

The Respondent respectfully submits that the Supreme Court of Georgia performed its statutory duty in determining that the death penalty was not excessive or disproportionate under the facts of this case, as compared to similar cases, and that none of Petitioner's constitutional rights have been violated. Respondent submits that this issue presents nothing for review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia, as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail with proper address and adequate postage to:

Ms. Alice C. Stewart
Attorney for Petitioner
967 Juniper Street, N.E.
Atlanta, Georgia 30309

This 6th day of January, 1983.

Susan V. Boleyn
SUSAN V. BOLEYN